

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

**L'HOIST NORTH AMERICA OF
TENNESSEE, INC.**

and

Case No. 10-CA-136608

**UNITED MINE WORKERS OF
AMERICA, DISTRICT 17**

MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

L'Hoist North America of Tennessee, Inc. ("Respondent" or the "Company") moves for summary judgment pursuant to the National Labor Relations Act, 29 U.S.C. § 160(b), Rule 56 of the Federal Rules of Civil Procedure and Section 102.24 of the Rules and Regulations of the National Labor Relations Board on the alleged Section 8(a)(1) violations asserted in paragraphs 7 and 8 of the Complaint.

I. CHARGE AND COMPLAINT BACKGROUND.

On September 12, 2014, the United Mine Workers of America ("UMW" or the "Union") filed an unfair labor practice charge alleging that the Company violated Section 8(a)(1) by "telling employees" that (a) the Company would "sponsor and accomplish" a decertification of the UMW; (b) that the Company would "only make one take it or leave it contract proposal"; (c) that "bargaining would be futile"; and (d) that bargaining "would last 2-3 years because the Union is holding it up." See 10-CA-136608 (9/12/14)("Original Charge").

On September 12, 2014, the Union filed a second charge, claiming that the Company violated Section 8(a)(1) by attributing the reason "for [the Company] withholding [a regularly scheduled annual pay increase]" and "for [the Company's]

cancellation [of an annual family outing] to the employees exercise of protected rights.”
See 10-CA-136615, ¶ 2 (9/12/14)(“Second Charge”).

On December 1, 2014, the Union filed a First Amended Charge in Case 10-CA-136608, (the “Amended Charge”). The Amended Charge consolidated the allegations contained in the Original Charge with the “attribution allegations” in the Second but dropped the allegation that the Company told employees it would “sponsor and accomplish” decertification and that “bargaining would last 2-3 years.” It added, however, a new claim that the Company made “implied promises to improve working conditions to discourage Union membership” not contained in either the Original or Second Charge. *See* Amended Charge, ¶ 2 (12/1/14).

On December 23, 2014, the Acting Regional Director for Region 10, Nancy Wilson, filed the Complaint and Notice of Hearing, commencing this action. The operative Section 8(a)(1) allegations are set forth in paragraphs 7 and 8 of the Complaint. Based on two isolated conversations, it charges two Company employees, Stacey Barry, a Regional Human Resources Manager, and Kenny Summers, a Mine Foreman, with improper speech.

As for Mr. Barry, the Complaint is limited to a single telephone conversation that allegedly took place at the end of July or early August 2014. In this call, the Complaint asserts that Mr. Barry threatened to cancel a family picnic and said that “employees would not get a raise “because they are represented by the Union.” In addition, the Complaint claims that Mr. Barry “impliedly promised” to improve terms and conditions of employment if they decertified the union. *See* Complaint, ¶ 7.

As for Mr. Summers, the Complaint alleges that, in a single August 2014 conversation in the mine, he told employees that the Company “will only make one contract offer to the Union and no more,” that employees “would not like the offer,”

and that it “would be futile for them to support the Union as their bargaining representative.” *See* Complaint, ¶ 8.

On December 31, 2014, Respondent filed its Original Answer, specifically denying the allegations in paragraphs 7, 8, 9 and 10 of the Complaint. *See* Original Answer, ¶¶ 7-10. In addition, Respondent specifically denied that Kenny Summers was acting as an agent of the Company related to the allegations contained in paragraph 8 of the Complaint. *See* Original Answer, ¶ 6.

A. Bargaining History Before the Original Charge was Filed.

On or about September 3, 2013, the Union filed a petition for election (10-RC-112410). This represented the Union’s second attempt to organize the Anderson mine, having lost an earlier election in 2012. The election was held on November 7, 2013, and the results favored the Union. The UMW was certified as the bargaining representative on November 18, 2013. No ULP charges or objections were filed by the Union relating to either the first or second election.

After conferring and exchanging document requests in December 2013 and January 2014, the parties scheduled their initial bargaining session for February 11-12, 2014 in Knoxville, Tennessee. At this first meeting, the Union presented, and the parties discussed, ground rules. No substantive proposals were presented because the Union had not completed its non-economic proposals and desired to present them as a package.¹ The parties later finalized and signed the ground rules on March 14, 2014.²

¹ On February 11, 2014, the Union also raised three discrete issues: (i) an interim grievance procedure; (ii) the status of the 2014 merit wage increase; and (iii) the vacation scheduling procedure. The Company requested that the Union submit a written proposal for an interim grievance procedure (which it agreed to do but never did). The Company also advised the Union that it did not intend to unilaterally increase wages pursuant to the performance review and merit increase program that governed non-union employees, but rather intended to negotiate with the Union over wage increases, including over the maintenance of the performance management and merit pay program. The Company pointed out that its employee handbook required Union agreement in order to apply the performance management/merit

Between February 11, 2014 and September 12, 2014 (the date the Original Charge was filed), the parties met to bargain approximately 15 times. Over the course of the sessions held on March 25th and 26th and April 7th, the Union presented its non-economic package, comprised of approximately 31 separate proposals (not including subsections). On May 1st and 2nd, the Company presented its non-economic proposals, including 20 articles and approximately 108 sections.³

Between the end of May and August, the parties held 9 bargaining sessions, comparing proposals, and negotiating differences. The parties reached several tentative agreements, including on union recognition, union stewards, bulletin board access, union business leave, union visitation, non-discrimination, hours of work (including 7 separate sub-sections), leaves of absence, a joint safety committee, and scope of the agreement. These agreements represented negotiated compromises of competing proposals achieved after exchanging multiple counter-proposals. The parties also devoted substantial attention to negotiating other provisions, including a no-strike/no lockout provision, the grievance and arbitration procedure, and clauses related to seniority, work rules, discipline and discharge, and the use of probationary and temporary employees.

pay increase program to bargaining unit employees. The Company also explained the process for approval of employee vacation requests.

² The ground rules were routine, providing for bifurcated bargaining (non-economic before economic), written tentative agreements, designation of chief spokespersons and professional conduct and amicable demeanor at the bargaining table.

³ When the parties resumed bargaining on May 1st and 2nd, the Union's chief spokesperson, Joe Carter, failed to attend. No advance notice of his absence was given. During these two days, no meaningful negotiations occurred, and the Union generated no counter-proposals. Given the Union's lack of preparation and superficial bargaining, the Company requested advance notice in the future if the Union's chief spokesperson would be absent so that the parties could reschedule and avoid unproductive meetings.

The parties agreed to resume bargaining on July 31st. The Union's chief spokesperson, however, failed again to attend. And in violation of the parties' understanding, the Union gave no advance notice of his absence. Without the Union's chief spokesperson or anyone else present with authority to negotiate and the Union's lack of preparation, the Company proposed to adjourn and reschedule this session.⁴ The Union consented, and the session was adjourned.

The parties next met on August 28th and 29th. At the August 28th session, the Union introduced Art Traynor, an in-house UMW attorney. The parties then bargained over seniority, bidding procedures, and the use of probationary and temporary employees. The parties reached a tentative agreement on a no-strike/no lockout provision. On August 29th, the parties turned again to seniority and the issue of probationary employees. At the mid-morning break, Mr. Traynor announced that the Union was filing unfair labor practice charges, and the meeting adjourned.

After the Union filed the Original Charge on September 12th and on October 3, 2014, Field Examiner David Watkins requested the Company's response to the allegations.⁵ Relevant here, Mr. Watkins elaborated on the Union's allegations, stating that "[a]round the end of July or the beginning of August of 2014 over the phone HR Manager Stacey Berry told an employee that the Employer was not going to have a family outing this year because of the expense of negotiating with the Union" and that

⁴ When the parties met, the Union's stand-in representative didn't recall the status of negotiations from the last session, did not have a copy of the Company's proposals and had prepared no responses or counter-proposals to those tendered on July 22nd. He stated that he wasn't "sure what those proposals were" and "didn't really know what we were going to do today."

⁵ On September 12th, the Union also filed two other ULP charges (10-CA-136615 and 10-CA 136617). These alleged that the Company unlawfully withheld the merit pay increase, canceled the family outing, changed employee's work schedules and bargained in bad faith. Except for the issues raised in the Complaint, all other allegations in these three charges have been dismissed.

“the Crab Orchard facility was having a family outing because they are non Union.”⁶ Per Mr. Watkins, the Union also claimed that on this call, “Berry made implied promises to improve working conditions if employees filed a decertification petition in October 2014.” Finally, Mr. Watkins stated that “[i]n August 2014, Supervisor Kenny Summers, while working underground, told employees that the Employer was going to give only contract proposal[s] that employees would not like.”

B. The Wage Increase Comment Allegation.

In the Second Charge, the Union alleged that the Company violated Section 8(a)(1) by attributing the reason “for [the Company] withholding [a regularly scheduled annual pay increase]” was due to the employees’ exercise of protected rights. In the Amended Charge, the allegation is more pointed; it asserts that employees were told that they did not get a raise “because of the Union.” The Complaint modifies the allegation to be that Mr. Barry, in a phone call in August 2014, told an employee that they would not get a wage increase “because they are represented by a union.”

As background, the Company maintains a performance-based compensation system at its non-union facilities. The overall budget for employee merit increases is annually established based on market conditions. The actual increase, if any, to each employee is then determined based on individual performance as decided by management in its sole discretion. Historically, annual merit adjustments are given in the third week of February (retroactive to January 1st). (Barry Decl. ¶ 59, fn. 3.) Thus,

⁶ In Charge 10-CA-136615 filed on September 12, 2015, the Union alleged that the Company had cancelled “a regularly held annual Employer sponsored dinner and entertainment excursion for employees and their families and *attributed the reason for its cancellation to the employees exercise of protected rights.*” See Charge 10-CA-136615, ¶ 2 (9/12/14). The derivative attribution allegation of Charge 10-CA-136615 resurfaced in the First Amended Charge 10-CA-136608 filed on December 1, 2014. There, the Union alleges that the Company told “employees that the Employer was not going to have a family outing because of the Union.” See First Amended Charge 10-CA-136608, ¶ 2 (12/1/14).

while the timing of the annual increase is fixed at mid-February (retroactive to January 1), the amount of the increase, if any, is discretionary.

After the Union election in November 2013, the Company was confronted with the issue of whether the Company, while negotiating a first labor contract, could be charged with an unfair labor practice for improper interference or unilateral change if it either provided or withheld the merit pay increase for the Anderson employees. In prior years, most non-union employees, including those at the Anderson mine, received, in varying amounts, the discretionary merit increase.⁷ (Barry Decl. ¶ 11.) This increase was unavoidably going to occur during first contract negotiations given that it was annually paid in the payroll processed in the third week of February. And in 2014, annual merit increases for non-union employees (including those at Crab Orchard) were, in fact, reflected in the payroll for February 21, 2014. (Barry Decl. ¶ 61.)

Given this Hobson's choice, the Company elected to notify the Union that it would refrain from unilaterally granting the discretionary merit increase but instead would bargain with the Union over it. And at the first bargaining session on February 11, 2014, the Company did so. (Barry Decl. ¶ 59.) By taking this course, the Company sought to act consistent with its duty to bargain. *See, e.g., NLRB v. Katz*, 369 U.S. 736 (1962)(Supreme Court approved the Board's determination that an employer violates Section 8(a)(5) when it awards merit-based wage increases during collective bargaining without first providing notice and an opportunity to bargain over the amount of the increase); *Alan Richey Inc.*, 359 NLRB 40 (2012); *Oneita Knitting Mills*, 205 NLRB 500

⁷ For example, in February 2012, the range of increases for the Anderson hourly workforce ranged from 0% (non-performing) to 4% (exceptional performance) for an overall average increase of 2.81%. In February 2013, Anderson employee merit increases ranged from 0% to 3.5%, with an average increase of 3.02%.

(1973).⁸ Had the Company unilaterally exercised its discretion and awarded the performance-based merit increases without notice and an opportunity to bargain, it was concerned that it may violate Section 8(a)(5) under the *Katz* doctrine.⁹

The Board has also consistently held that a company does not violate Section 8(a)(1) or 8(a)(5) when annual salary adjustments are deferred during first contract negotiations when, as here, the Union has had notice and opportunity to bargain over those adjustments. *See, e.g., TXU Electric Company*, 343 NLRB 1404 (2004). The same approach is affirmed under *Stone Container*, 313 NLRB 336 (1993), where the Board recognized an exception to the general rule that an employer must refrain from making unilateral changes during contract negotiations. The Board held that because the annual wage review was a discrete event, the employer, after giving notice and providing an opportunity to bargain, was privileged to maintain the wage status quo if, when given the opportunity to bargain, the Union did not. No violations were found in these cases (none of which also involved, as here, an overriding agreement defer negotiations over the wage increase to a later date).

In the present case, the Union claims Mr. Barry told an employee that the Crab Orchard facility got a raise, but the union employees did not “because of the Union.”

⁸ The Board in *Alan Richey* discussed *Oneita Knitting* at length, observing that the case confirms an employer “violated Section 8(a)(5) by unilaterally granting merit wage increases to represented employees, even though it had a past practice of granting such increases.” The Board explained that “An employer with a past history of a merit increase program may neither discontinue that program...nor may he any longer continue to unilaterally exercise his discretion with respect to such increases, once an exclusive bargaining agent is selected.” *NLRB v. Katz* 369 U.S. 736 (1962). What is required is a maintenance of preexisting practices, *i.e.*, the general outline of the program, however the implementation of that program (***to the extent that discretion has existed in determining the amounts or timing of the increase***) because a matter to which the bargaining agent is entitled to be consulted. *Alan Richey*, 359 NLRB at 40 (*quoting Oneita Knitting* at 500)(emphasis supplied). The Company has continued to maintain the general outline of the performance review/merit based pay program at Anderson.

⁹ Past history demonstrates the Hobson’s choice facing the Company. In 2008, the UMW attempted to organize the Crab Orchard facility. Then, the Company opted to maintain the annual merit pay increases and processed them during the course of the organizing effort. In response to the unilateral implementation of the annual pay increase, the UMW filed an unfair labor practice charge, accusing then-management of violating the Act by providing the increase.

This statement is in dispute. Mr. Barry did visit the Anderson plant on April 6, 2014, the day before the April 7th bargaining session. (Barry Decl. ¶ 60.) He was approached by two hourly employees, both outspoken Union supporters. He was asked by Paul Guess about a 2014 pay increase. Ransom Green inquired if certain maintenance employees could be upgraded in pay. *Id.*

Both conversations occurred after the Union and the Company had bargained on February 11th and March 25th-26th and after the parties had signed the ground rules MOU on March 14, 2014. At that point, the Company's position on the merit increase had been conveyed to the Union two months earlier. (Barry Decl. ¶ 61.) The merit increase had also not been implemented on February 21, 2014. Thus, both employees – as well as the Union – had unequivocal notice of the Company's position on the merit increase no later than February 21, 2014. Both employees had received at least three pay checks by the time the conversation occurred and knew that the pay increase would be determined by collective bargaining. *Id.*

In response to their queries, Mr. Barry fairly explained to both that wages are subject to the bargaining process, and that management cannot promise or discuss wages directly with employees because the Union is their bargaining representative. (Barry Decl. ¶ 62.) Mr. Barry also told them that the Company must follow the law and respect the bargaining process. Mr. Barry never told Paul Guess or Ransom Green – or any other hourly employee - that raises were withheld “because of the Union.” *Id.*

C. The Decertification Comment Allegation.

In the Original Charge, the Union claimed that Mr. Barry told employees that the Company would “sponsor and accomplish a decertification.”¹⁰ See Original Charge, ¶ 2.

¹⁰ In the First Amended Original Charge, the Union alleges that “implied promises to improve working conditions were made to discourage union membership,” without reference to decertification. The

Mr. Barry disputes that he made any such implied promises. (Barry Decl. ¶ 65.) Accordingly, the Company moves for summary judgment on this allegation based on the absence of any evidence to support it.

In or around June 2014, Mr. Barry was, however, approached by Travis Holt, a bargaining unit employee, and asked how employees “could get rid of the Union.” (Barry Decl. ¶ 64.) Neither the conversation nor the topic was initiated by Mr. Barry. *Id.* In response, Mr. Barry told Mr. Holt that employees would have to follow NLRB election procedures and that the Company could have no involvement. *Id.* Mr. Barry did explain that the Board imposed certain time limitations on such proceedings, and suggested that Mr. Holt consult the NLRB website or contact the NLRB via phone to get additional information. Other than this isolated, brief conversation, Mr. Barry never spoke to any other employee about decertification. To the extent the Complaint is mistakenly referring to the Barry/Holt conversation, the Company moves for summary judgment as well.

D. The Family Outing Comment Allegation.

In 10-CA-136615, the Union alleged that the Company made a unilateral change by “not holding its family outing.” This allegation, however, was untrue and known to be untrue at the time the charge was filed on September 12, 2014. *See* Charge 10-CA-136615. This portion of the charge was dismissed. The derivative allegation that the Company told employees that it was cancelled because of the Union survives.

According to the Complaint, the derivative allegation is based on a phone conversation with Regional HR Manager Stacey Barry in late July or early August 2014.

“implied promise” allegation first surfaced in Watkins letter of October 3rd (i.e., that in July or August and over the phone, “Berry made implied promises to improve working conditions if employees filed a decertification petition in October 2014.”) *See* Exh. D, p. 1. Mr. Watkin’s explanation of this allegation, however, was inconsistent with the allegations of the Original Charge and Second Charge.

Mr. Barry did speak by phone with Paul Guess, a bargaining unit employee, on August 14, 2014 concerning the family outing. There is, however, a material factual dispute over the contents of this conversation.

The Union claims that Mr. Barry told Mr. Guess that the family outing would not occur because of the expense of labor negotiations but that the Crab Orchard employees were having an outing “because they are non-union.” The Union also apparently claims that during the call, Mr. Barry “made implied promises to improve working conditions if employees filed a decertification petition in October 2014.” No specifics about the alleged “implied promises” have ever been provided.

According to Mr. Barry, he spoke with Paul Guess by phone on August 14, 2014 and discussed the family outing. (Barry Decl. ¶ 47.) He explained that the Company would hold the outing and that the Plant Manager (Joe Gonzales) would be notifying the workforce once arrangements had been finalized. The phone call ended with Mr. Guess stating that he “understood and would wait to hear” from Mr. Gonzales. During the call, Mr. Barry never said the event was cancelled, blamed the union for the cancellation or the lack of merit pay increases and made no promise(s), express or implied to improve working conditions. (Barry Decl. ¶ 55.)

The Complaint issued due to the conflicting versions and unresolved credibility dispute. The surrounding circumstances, however, support Mr. Barry’s version of events. The evidence will show that another hourly employee, Wendy Hannah, advised Paul Guess on or about August 14th that the employee outing would occur. (Barry Decl. ¶ 47.) And on August 17, 2014, Ms. Hannah visited Pin Strikes, an entertainment center in Chattanooga, Tennessee, to inspect the facility as a possible

venue for the family outing.¹¹ In early September, Joe Gonzalez, the Plant Manager, scheduled the outing at Pin Strikes, and on September 9th – 3 days before the Union filed the ULP charge - notified all employees that the outing would be held on October 4th. (Barry Decl. ¶ 49.) Flyers were also posted on bulletin boards, in the break room, at time clocks and distributed to employees. And the family outing was held, as scheduled, at Pin Strikes on October 4th.

As explained in more detail in the argument section, the conflicting versions of the phone call between Mr. Barry and Mr. Guess do not preclude summary judgment on this allegation of the Complaint. *See* Complaint, ¶ 7(i) and (ii).

E. Motion for Summary Judgment.

The Company moves for summary judgment on these two alleged conversations that form the basis of the Complaint because the Union has (1) no evidence that the family outing comment was coercive or interfered with employees' rights; (2) no evidence the Company made implied promises or otherwise improper statements regarding decertification; (3) no evidence that its statements regarding the wage increase interfered with employees' Section 7 rights; and (4) no evidence that Mr. Summers either made improper statements or was an authorized agent of the Company with respect to collective bargaining matters.

In the absence of genuine issues of material fact requiring a hearing before an administrative law judge, summary judgment is appropriate. *Teamsters Local Union No.*

¹¹ Pin Strikes has bowling lanes, a laser tag facility, video arcade, bumper cars, a balladium and billiards. It also has restaurant, Splitz Bar & Grill, on site. On August 17th, Ms. Hannah spoke with the Pin Strikes manager and obtained initial pricing for employee gift cards and food, including pizza and chicken tenders and relayed the information to the Plant Manager, Joe Gonzales, who, in turn, scheduled the employee outing for October 4, 2014. Mr. Gonzalez negotiated a package to permit employees to enjoy bowling and games and receive a \$125.00 gift card. Based on 54 employees, the facility, gaming cost and food for the outing was estimated at approximately \$8,250.00.

579, 350 NLRB 1166, 1168 (2007); *Marble Polishers Local 47-T (Grazzini Bros.)*, 315 NLRB 520, 522 (1994).

II. SUMMARY JUDGMENT STANDARD

Proceedings that allege an unfair labor practice, “shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States.” 29 U.S.C. § 160(b). The NLRB often looks to the Federal Rules of Civil Procedure when deciding motions before it.¹² See Fed. R. Civ. P. 56. Public policy favors the granting of summary judgment where no relevant factual issues exist. *NLRB v. International Asso. of Bridge, etc.*, 549 F.2d 634, 639 (9th Cir. 1977).

No admissible evidence supports the Union’s claims. Summary judgment is, therefore, appropriate since there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). In all cases in which summary judgment is sought, “the nonmoving party cannot respond by merely resting on the pleadings, but rather the nonmoving party must present some ‘specific facts showing that there is a genuine issue for trial.’” *Id.* (emphasis added). Thus, because this motion presents, in part, a no-evidence motion for summary judgment, there must be produced sufficient evidence in opposition to the motion to permit a reasonable factfinder to find for that party. The mere existence of a

¹² See, e.g., *Yale University*, 330 NLRB 246, 246-47 (1999) (“In reviewing the Respondent’s motion to dismiss the complaint for failure of proof as to an essential element of the General Counsel’s case, we are guided by Fed. R. Civ. P. 52(c), which permits the trial judge to enter a judgment against a party when the evidence shows that that party has not sustained its burden of proof”); *United Auto Workers Local 122*, 239 NLRB 1108, 1112 (1978) (“In considering the Respondent’s motion to dismiss at the end of the General Counsel’s case, I am guided by Rule 41(b) of the Federal Rules of Civil Procedure which are to be applied to Board procedures ‘so far as practicable’”); see also *Excel DPM of Arkansas, Inc.*, 324 NLRB 880, 882 (1997) (Board granting General Counsel’s motion for summary judgment on the pleadings because “Respondent’s answer raises no issues warranting a hearing and that the General Counsel is entitled to prevail on all allegations of the complaint”).

scintilla of evidence in support of the Complaint is insufficient. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Moreover, speculation (or argument) cannot stand in the place of adequate evidentiary proof. *Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573, 576 (1951).

For the reasons set forth herein, no genuine issues of material facts exist, and the Respondent is entitled to summary judgment as a matter of law.

III. STATEMENT OF UNDISPUTED FACTS

The undisputed facts are established by and set forth in the attached sworn Declaration of Stacey Barry, discussed herein and incorporated by reference.

IV. LEGAL ARGUMENT

A. The Alleged Family Outing Comment Was Not Coercive and Did Not Interfere With Employee Rights.

Section 8(a)(1) forbids employers to “interfere with, restrain, or coerce” employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). The Board’s “well settled” test for a Section 8(a)(1) violation is “whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.” *American Freightways Co.*, 124 NLRB 146, 147 (1959). As stated by the Sixth Circuit:

The test for determining whether an employer has violated section 8(a)(1) is whether the employer’s conduct tends to be coercive or tends to interfere with the employees’ exercise of their rights. In making this determination, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees.

United Parcel Serv. v. NLRB, 41 F.3d 1068, 1071-72 (6th Cir. 1994).

Here, the total context in which this statement was allegedly made rebuts the claim that it tended to be coercive or interfere with the employees’ exercise of their rights. According to the Complaint, the comment was made in a phone conversation

between Mr. Barry and a single employee. Mr. Barry pinpoints the date of this conversation as August 14, 2014.

This allegation was originally derivative of the Union's claim in Charge 10-CA-136615 that the Company had canceled the employee outing. *See* Second Charge, ¶ 2 (9/12/14). Then, the Union claimed that Mr. Barry attributed the cancellation to some unidentified protected activity. The primary allegation of that Charge was false and has now been dismissed because the outing was not cancelled but held on October 4, 2014. Thus, the alleged statement attributed to Mr. Barry must be evaluated in the context that the outing was held, not cancelled.

Given that the outing was held, the primary claim was false. Another contextual fact of relevance is that both the primary and derivative allegation was made at a time (September 12, 2014) when the Union knew the outing was scheduled for October 4, 2014. Thus, another contextual fact is that the Union made the sworn allegation that the event had been cancelled when it knew that allegation to be false at the time it was made and when the charge was filed.

The fact that the parties disagree about the content of the August 14th conversation is not determinative of the outcome of this motion. Mr. Barry reports that when he spoke with Paul Guess, on August 14, 2014, he told him that the family outing would be held, and that the plans would be announced shortly. (Barry Decl. ¶¶ 47-55.) Mr. Barry will testify that there were no discussions about cancelling the family outing, Crab Orchard's non-union status, or placing blame on the Union. In opposing this motion, Mr. Guess apparently will declare that he was told that the outing had been cancelled because of the Union.

Context matters. This credibility dispute is trumped by the surrounding circumstances that are not in dispute. They unequivocally show that any

misimpression that Mr. Guess may have formed about the cancellation of the outing was quickly corrected. Stated differently, the immediate circumstances obviated any perceived interference or threat to eliminate the outing and remedied any possible coercive effect perceived by Mr. Guess.

It is undisputed that on or about August 14, 2014, another hourly employee, Wendy Hannah, advised Paul Guess that the employee outing would be held. (Barry Decl. ¶ 48.) Her conversation with Mr. Guess occurred at or about the same time as his phone conversation with Mr. Barry. She knew that the outing was being planned because the Plant Manager had asked her to visit Pin Strikes, a local entertainment venue, to determine whether it could host the outing.

It is also undisputed that on August 17, 2014 – 3 days after Mr. Guess spoke with Mr. Barry, she visited Pin Strikes to assess the facility as a possible venue for the family outing. After she met with the Pin Strikes manager and obtained pricing for the employee gift cards, food and entertainment, Ms. Hannah reported to the Plant Manager. Ms. Hannah's activities were not secret. Any confusion that Mr. Guess may have had after speaking with Mr. Barry was alleviated if not immediately, within a matter of 2-3 days.

It is also undisputed that in or about the first week of September, Mr. Gonzalez, the Plant Manager, scheduled and announced the family outing for October 4, 2014 at Pin Strikes. (Barry Decl. ¶ 49.) In the recent past, the 2012 and 2013 family outings had been held at Lake Winnepesaukah, a small amusement park near Chattanooga. In 2010 and 2011, the employee outing was held as a cookout in a pumpkin patch next to the Anderson plant with horseshoes and bingo as entertainment. Rather than being cancelled, the 2014 outing was an upgrade, with budgeted costs expected to exceed \$8,000.00.

It is also undisputed that on September 9, 2014 – 3 days before the Union filed the ULP charge claiming interference because Mr. Guess had been told the event had been cancelled, the Company notified all employees that the family outing would be held at Pin Strikes on October 4th. (Barry Decl. ¶ 50.) In addition, flyers were posted on bulletin boards, in the break room, at time clocks and distributed to the production and mining employees. With flyers in hand announcing the outing, the Union nevertheless filed the ULP charge claiming it had been cancelled. And after it was held on October 4th, the false charge was dismissed – except only for the derivative interference claim.

The Company's conduct – occurring immediately at and/or after the time the phone call between Mr. Barry and Mr. Guess occurred obviated any possible threat to reduce, eliminate or cancel the family outing. Because there is no or insufficient evidence to support this allegation that this phone call was coercive or interfered with the employees' exercise of their rights, summary judgment should be granted.

B. The Union Has No Evidence of Unlawful Implied Promises or Otherwise Improper Statements Regarding Decertification.

Although the Union alleges that Mr. Barry made implied promises to improve working conditions if they decertified the Union in October 2014, it fails to identify what statements were made or the circumstances under which they were made. As such, the Complaint, as it presently stands, fails to state a claim upon which relief can be granted, and the conclusory Complaint does not satisfy the burden to prove that any alleged statements were implied promises of benefits.

Determining whether a statement is an implied promise of benefit involves consideration of the surrounding circumstances and whether, in light of those circumstances, employees would reasonably interpret the statement as a promise. *See*

Viacom Cablevision, 267 NLRB 1141, 1141 ("the question is, was there a promise, either express or implied from the surrounding circumstances"); *Crown Electrical Contracting, Inc.*, 338 NLRB 336, 337 (2002) (finding employees could not reasonably interpret employer statement as implied promise). *G & K Servs.*, 2011 NLRB LEXIS 619 (2011). Employers are certainly entitled to make statements of fact. *Id.* Thus, without either allegations to support what was said or the context in which it was said, there is no evidence that any alleged statements were, in fact, unlawful implied promises.

To the extent the Union has conflated the conversation that Mr. Barry had with employee Travis Holt, Mr. Barry lawfully responded to Mr. Holt's unsolicited inquiry asking how the employees "could get rid of the Union." (Barry Decl. ¶ 64.). Mr. Barry explained that employees would have to follow NLRB election procedures and that the Company could have no involvement with it. *Id.* Mr. Barry suggested that Mr. Holt contact the NLRB for more information. *Id.*

An employer may lawfully respond to an employee's questions about decertification with general information about the process. *Harding Glass Co.*, 316 NLRB 985, 991 (1995). *See also Ernst Home Centers*, 308 NLRB 358 (1992). Here, there is no evidence that the Mr. Barry improperly responded to the unsolicited inquiry from an employee regarding decertification. In fact, when asked, Mr. Barry properly referred the employee to the Board. *See Ernst Home Centers*, 308 NLRB at 358. Accordingly, absent contrary evidence that raises a material question of fact, summary judgment should be granted on this claim.

C. The Union Has No Evidence that Mr. Barry's Statement Regarding the Wage Increase Were Improper or Otherwise Interfered with Employees' Section 7 Rights.

The Respondent is also entitled to judgment on the allegation that Mr. Barry, in a phone call in August of 2014, told an employee that they would not get a wage increase

“because of the union” or “because they are represented by a union.” This allegation, too, is derivative of the primary allegation that the Company violated the Act when it did not unilaterally implement the discretionary merit pay increases in February of 2014. The primary allegation, however, was dismissed, leaving only the derivative allegation about the attribution of blame standing.

No evidence has been submitted about the Union’s version of the phone conversation referenced in paragraph 7(iii) of the Complaint. The Declaration of Mr. Barry, however, reports his face-to-face conversations with two employees that occurred on April 6, 2014 (not in July or August of 2014), the day before the April 7th bargaining session. (Barry Decl. ¶ 60.) While at the Anderson Plant, Mr. Barry testified that he was approached by Mr. Guess and Ransom Green. Mr. Guess asked about the status of the 2014 pay increases. Mr. Green asked if certain maintenance employees could be upgraded in pay. These conversations occurred after the Union and the Company had bargained on February 11th and March 25th-26th, after the parties had signed the ground rules on March 14, 2014, and after the pay increase had not been given on February 21, 2014.

As for context, at the time of this conversation, the Company’s position on the merit increase had been communicated to the Union almost two months earlier. Having received at least three paychecks, both employees also had unequivocal notice that the 2014 pay increase had not been implemented. Both were well known union supporters who interfaced with Barry Morris, the employee representative attending bargaining sessions. Before approaching Mr. Barry, they both knew or should have known of the Company’s position on the merit increase as well as the March 14th agreement deferring negotiations on wages (including any merit increase).

According to Mr. Barry, he explained to both that wages and benefits are subject to the bargaining process, and that management cannot promise or discuss wages and benefits directly with employees because the Union is their bargaining representative. (Barry Decl. ¶ 62.) He also testified that he told them that “we must follow the law and respect the bargaining process.” *Id.* He states that he never told Mr. Guess or Mr. Green – or any other hourly employee - that merit increases were being withheld “because of the Union” or anything to that effect. His intent was simply to explain to the employees his understanding of the law, i.e. that the Company cannot make unilateral changes to wages by implementing the merit pay increases without first discussing it with the Union. From the allegation in the underlying charges and the Complaint, it is unclear whether Mr. Guess or Mr. Green disagree with his recollection of the conversations.

There is no evidence to dispute that the Company withheld the discretionary pay increase in order not to make an improper unilateral change in compensation and to comply with the technical requirements of the Act as it pertains to discretionary merit increases that arise in the context of first contract negotiations. Rather than interfere with protected rights, the Company affirmed them. It notified the Union – at the first bargaining session – that it had the duty to negotiate wage increases with the Union and did not intend to unilaterally implement discretionary merit pay increases. The Company did exactly what the law requires; it gave the Union notice and an opportunity to bargain. And afterwards, the parties agreed to bargain about it but only after concluding non-economic negotiations.

Under these circumstances, an employer is permitted to explain to employees that the pay increase is subject to collective bargaining and will be addressed in negotiations with the Union and not unilaterally provided. These statements are lawful and do not shift to the Union the onus or blame for the delay or postponement of such

increases. Here, the pay increases were dependent on management discretion, and the Company faced the Hobson's choice between granting a discretionary merit increase or deferring to collective bargaining over them with the Union. *See, e.g., Veteran's Thrift Stores*, 272 NLRB 572, 572-573 (1983); *Singer Co.*, 199 NLRB 1195, 1196 (1972). An employer is permitted to take such steps in order to mitigate the risk of an unfair labor practice charge and can carefully explain it to employees without tripping over Section 8(a)(1).

Because the content of Mr. Barry's conversation is not in dispute, and, as a matter of law, the content of his speech was lawful and proper, and there is no evidence that it interfered with employees' protected rights, summary judgment should be granted.

D. Statements Attributed to Kenny Summers are Not Actionable Because The Union Has No Evidence That Summers Was an Agent of Respondent for Purposes of Collective Bargaining.

The undisputed summary judgment evidence also shows that Kenneth Summers had no involvement in collective bargaining. (Barry Decl. ¶¶ 67-73.) Mr. Summers has not participated in any meetings with Company management to prepare for bargaining. He has never been briefed on the status of negotiations. No Company proposals have ever been shared with Mr. Summers. He has never been a member of the Company's bargaining team or attended a bargaining session. While the Company concedes that Mr. Summers is a statutory supervisor under the Act, he is not, however, an agent of the Company for purposes of commenting on the Company's bargaining agenda, proposals, counter-proposals or strategy.¹³ *Id.*

¹³ To be deemed a statutory supervisor and agent of the employer, the individual must engage in one or more of the types of conduct enumerated in Section 2(11) of the Act. *See NLRB v. Health Care & Ret. Corp. of Am.*, 511 U.S. 571, 574 (1994) (to be deemed a supervisor, the employee must have authority to engage in 1 of the 12 listed activities in section 2(11), use independent judgment, and hold authority in the employer's interest). Mr. Summers lacks the authority to perform most of the functions in section 2(11). Mr. Summers has not hired, transferred, suspended, laid off, recalled, discharged, rewarded, or

Board law regarding the principles of agency is set forth and summarized in its decision in *Pan-Oston Co.*, 336 NLRB 305 (2001). The Board applies the common law principles of agency in determining whether an employee is acting with apparent authority on behalf of the employer when that employee makes a particular statement or takes a particular action. *Cooper Industries*, 328 NLRB 145 (1999); *Hausner Hard Chrome of KY, Inc.*, 326 NLRB 426, 428 (1998). Apparent authority results from a manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question. *Southern Bag Corp.*, 315 NLRB 725 (1994). Either the principal must intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize that its conduct is likely to create such a belief. *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988)(citing Restatement 2d, Agency, § 27 (1958, Comment a)).

The Board's test for determining whether an employee is an agent of the employer is whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management. *Waterbed World*, 286 NLRB 425, 426-427 (1987), *enf'd* 974 F.2d 1329 (1st Cir. 1992). The Board considers the position and duties of the employee

disciplined any employee or adjusted a grievance or even "effectively recommended" such action. Mr. Summers is required to consult with one or more superiors and obtain their express approval. However, he does participate in the evaluation of employees and has the authority to suspend an employee in the event serious misconduct occurs in the mine. Because he possesses the authority to evaluate and suspend, he meets at least one prong of section 2(11). Mr. Summers also has the authority to "assign" employees or "responsibly to direct them" while working in the mine. Mr. Summers examines and inspects mine headings, and uses his professional judgment and experience, to choreograph, assign and direct the drilling, blasting and scaling work, to maintain a safe working environment and to troubleshoot problems that might occur. In that role, Mr. Summers has been delegated sufficient authority - but only in the management and supervision of the mining operations - to qualify as a supervisor under the Act. See *Poultry Enterprises, Inc. v NLRB*, 216 F.2d 798 (5th Cir. 1954); see also *NLRB v. Scullin Steel Co.*, 161 F.2d 143 (8th Cir. 1947).

in addition to the context in which the behavior occurred. *Jules V. Lane*, 262 NLRB 118, 119 (1982). See also *CNN Am., Inc.*, 2008 NLRB LEXIS 378 (Nov. 19, 2008).

The Board may find agency where the type of conduct that is alleged to be unlawful is related to the duties of the employee. For example, in *Hausner Hard-Chrome*, the Board found that the heads of various departments who regularly communicated management's production priorities to employees acted as agents of the employer when they told employees that the employer would likely shut down the plant if employees voted in favor of a union. 326 NLRB at 428.

In contrast, the Board may decline to find agency where an employee acts outside the scope of his or her usual duties. Thus, in *Waterbed World*, the Board found that an employee who interrogated other employees and threatened them with discharge did not act as an agent of the employer because the employer had never held out the employee as being privy to management decisions or as speaking on its behalf. 286 NLRB at 426.

Although not dispositive, the Board will also consider whether the statements of an alleged employee agent were consistent with statements or actions of the employer. The Board has found that such consistencies support a finding of apparent authority. For example, in *Hausner Hard-Chrome*, the Board found that the "manifestation of apparent authority was strengthened" because the statements made by the department heads were consistent with statements made by management. 326 NLRB at 428. See also *Great American Products*, 312 NLRB 962 (1993).

An employee may also be an agent of the employer for one purpose but not another. For example, in *Cooper Industries*, the Board found that employees could reasonably believe that employee facilitators who made various coercive statements acted as agents of the employer because the employer had held them out as primary

conduits for communication with management. However, the Board found that employees would not reasonably believe that a facilitator who attended a union meeting acted as an agent of the employer for purposes of surveillance where the union representative had questioned the facilitator, accepted his explanation that he was there as a regular worker, and permitted him to remain. 328 NLRB 145, 146.

It is the burden of the party who asserts that an individual has acted with apparent authority to establish the agency relationship. *Millard Processing Services*, 304 NLRB 770, 771 (1991), *enf'd*. 2 F.3d 258 (8th Cir. 1993), *cert. denied* 510 U.S. 1092 (1994). The party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful.

In applying these principles here, there is no genuine issue of material fact that the Respondent has taken no action from which employees could reasonably conclude that Kenny Summers was acting on the Company's behalf when he engaged in the specific conduct alleged to be unlawful.

Summers is a working mine foreman who coordinates mining activities. (Barry Decl. ¶ 68.) His job is to examine and inspect mine headings, and to choreograph, assign and direct the drilling, blasting and scaling work that occurs in the mine. He is also responsible for maintaining a safe working environment and trouble-shooting any problems that might occur. *Id.* But he is not a member of the Company's bargaining team or committee, was never consulted about the Company's bargaining proposals, was not provided the Company's bargaining proposals and was never been briefed by any member of Company management regarding any of the Union's or the Company's proposals or negotiations. (Barry Decl. ¶ 69.) He was excluded from the Company's bargaining process.

Mr. Summers was not delegated the authority to speak on the Company's behalf

about the collective bargaining process with the Union. *Id.* He was never asked to communicate with employees about collective bargaining. There is no evidence that the Company did anything to create a belief that it had authorized Mr. Summers to speak to the employees about the Company's bargaining strategy or proposals or to act for the Company on the topic of collective bargaining. The Company has never held out Mr. Summers as being privy to management decisions, strategies or proposals regarding collective bargaining, the status of negotiations or as speaking on its behalf. There is no evidentiary basis for any employee to reasonably believe that Mr. Summers was reflecting Company policy and speaking and acting for management. *Id.*

In addition, the comments attributed to Mr. Summers are unrelated to his duties. He does not communicate management's bargaining priorities or positions to employees. In fact, it is undisputed that on or about May 2, 2014, Mr. Summers had been expressly prohibited from engaging in discussions with employees about collective bargaining. (Barry Decl. ¶¶ 70-71.) Had he made these comments, he would have been acting outside the scope of his usual duties and contrary to an express restriction on his authority. *Id.* Finally, the statements attributed to Mr. Summers are inconsistent with the statements and actions of the Company.¹⁴ (Barry Decl. ¶¶ 72-73. Accordingly, Mr. Summers was not acting as an agent of the Company when he allegedly expressed his opinions about collective bargaining to employees.

Respondent is, therefore, entitled to summary judgment on the allegations contained in paragraph 8 of the Complaint.

¹⁴ The statements attributed to Kenny Summers are demonstrably untrue. The allegation in the Complaint claims that the statements were made in August of 2014. At this point in time, the parties had been negotiating for six months. And given the extent of the parties' negotiations, proposals, counter-proposals and tentative agreements that had been achieved by August 2014, the comments are nonsensical and disconnected from reality. Assuming the Union briefs the bargaining unit on the negotiations, the obvious falsity of the statements allegedly made by Mr. Summers would have made him appear utterly ignorant of the status of bargaining.

V. CONCLUSION

Given the absence of genuine issues of material fact requiring a hearing before an administrative law judge, the Company respectfully requests that this Motion for Summary Judgment be granted, that the action be dismissed with prejudice and for such other and further relief to which it may be entitled.

Dated: February 23, 2015

Respectfully submitted,

JACKSON LEWIS PC
500 N. Akard, Suite 2500
Dallas, Texas 75201
PH: (214) 520-2400
FX: (214) 520-2008

By: /s/ Dan Hartsfield
Dan Hartsfield
dan.hartsfield@jacksonlewis.com

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February 2015, a true and accurate copy of the foregoing **Motion for Summary Judgment and Brief in Support** was filed electronically through the E-Filing system. It has also been served on the following:

Nancy Wilson
Acting Regional Director
National Labor Relations Board
Region 10
233 Peachtree Street, NE
Harris Tower, Suite 1000
Atlanta, GA 30303

Jerry Stallard, Int'l Rep
United Mine Workers of America
Local 9127
P.O. Box 401
Coeburn, VA 24230-040

Joseph Carter, Int'l Vice President
United Mine Workers of America
1300 Kanawha Blvd. E
Charleston, WV 25301-301

Arthur Traynor
Associate General Counsel
United Mine Workers of America
18354 Quantico Gateway Dr., Suite 200
Triangle, VA 22172-1779

/s/ Dan Hartsfield
Dan Hartsfield

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10**

**L'HOIST NORTH AMERICA OF
TENNESSEE, INC.**

and

Case No. 10-CA-136608

**UNITED MINE WORKERS OF
AMERICA, DISTRICT 17**

DECLARATION OF STACEY BARRY

I, Stacey Barry, declare under penalty of perjury as follows:

Background and Qualifications

1. I am over the age of 21 and am fully competent to make this Declaration. Each and every statement of fact set forth in this Declaration is based on my personal knowledge and is true and correct. I submit this Declaration in support of L'Hoist North America of Tennessee, Inc. ("LNA" or the "Company") in connection with the Complaint issued on December 23, 2014.

2. I received my Bachelor of Science in Organizational Communication from Murray State University and MBA from Webster University. I have been employed as a Human Resource professional since 1996. Over the past 19 years, I have worked in various manufacturing environments including the toy industry (Mattel Corporation), lawn mower engines (Briggs and Stratton), barge and towboats (Jeffboat LLC), iron ductile pipe (U.S. Pipe and Foundry) and mining with LNA. During this time, I have worked with many union organizations including the International Brotherhood of Teamsters, United Mine Workers of America, United Steelworkers of America, International Union of Operating Engineers, the International Association of Machinists and Aerospace Workers, the International Brotherhood of Boilermakers, and the International Brotherhood of Electrical Workers Union.

3. At all times relevant to the matters raised in Charge 10-CA-136608, I was employed by LNA as the Director of Human Resources. In that role, I was responsible for directing and leading the HR function in the East Region. My duties included leading bargaining, recruiting and staffing, directing policy implementation, managing Family and Medical Leave and Workers Compensation, training and development, and overseeing compensation and benefit administration.

The UMW and LNA

4. In the fall of 2013, the United Mine Workers of America (“UMW” or the “Union”) filed an RC petition with the NLRB. An election was held in November 2013 at the Anderson Plant in Sherwood, Tennessee. The Union prevailed and was then certified as the bargaining representative of the production and mining workers at the Anderson Plant. No unfair labor practice charges or objections were filed by the Union during the campaign or after the election relating to it.

5. LNA has many other unionized facilities across the United States and Canada. For example, in my area of responsibility, the facilities in my area are the Calera, AL represented by the United Steelworkers of America and the UMW representing our Anderson plant. As a general rule, we have positive, amicable relationships with the unions who represent our employees.

Bargaining History Between the Parties

6. In December 2013 and January 2014, the Union and the Company served information requests, exchanged data, and prepared for the start of bargaining for a first labor contract. The parties agreed to meet for their first face-to-face session in Knoxville, Tennessee on February 11, 2014.

Initial Bargaining Session

7. At this first session, I attended, and Durell Vieau, Clint Kelley, Geoff Fehr, Joe Gonzalez, Dan Hartsfield, David Puryear, Phillip Longstreet and Jennifer Robbins were also present on behalf of LNA. Ms. Robbins attended as the Company scribe.

8. For the Union, Freddy White (Retired Union Consultant), Barry Morris (bargaining unit employee from the Anderson plant), Gerry Stallard (the Union organizer), and Ken Holbrook (Union Field Representative) attended. Joe Carter did not attend.

9. At this initial session, Mr. Holbrook proposed “ground rules” that the Company considered and generally accepted. The parties discussed negotiating non-economic terms first before turning to economics, the need to reduce proposals to writing, the procedure for tentative agreements, the designation of a single chief spokesperson for each side who would have the authority to negotiate and bind the parties and sign tentative agreements and proper demeanor and professionalism at the bargaining table. Mr. Holbrook represented that Joe Carter would serve as the Union’s chief spokesperson. The parties agreed to revise the draft ground rules and generate a new proposal consistent with their discussions.

10. After tabling the ground rules, Mr. Holbrook indicated that he brought a “few proposals,” including one that he “needs to edit,” but explained that the Union had not completed its non-economic proposals. In response, we offered either to review the Union’s incomplete proposal package or wait until the Union completed its opening proposals. Mr. Holbrook chose the latter, stating that the Union would finish its initial proposals within a “week to 10 days.”

11. Mr. Holbrook then raised three specific issues: (i) an interim grievance procedure; (ii) the status of the 2014 discretionary merit wage increase; and (iii) the procedure to schedule vacations. We asked Mr. Holbrook to put the Union’s proposal for an interim grievance procedure in writing, and we agreed to consider it. We have never received that proposal. The Company also explained the process for supervisors to approve employee vacation requests.

12. As for the 2014 merit increase, we advised Mr. Holbrook, as well as the other Union representatives at the bargaining table, that we did not intend to

unilaterally provide the 2014 merit wage increase to the Anderson Plant employees without first negotiating with the Union. Mr. Hartsfield, as the Company's Chief Spokesperson, explained that the Company viewed wages as a mandatory subject of bargaining that should be addressed by the parties at the bargaining table with the Union when the parties turned to economics. In addition, we provided the Union with the Company's employee handbook. We pointed out to Mr. Holbrook the section on page 51, under Performance Management, that explained the annual performance review process underlying the management's discretionary decisions regarding merit pay increases. The last sentence of this handbook provision states that "participation of bargaining unit employee members are determined on a site-by-site basis." We explained that the participation of bargaining unit members in the performance management and merit increase program depends on the union's agreement to do so.

13. After a caucus, Mr. Holbrook voiced no objection to addressing the 2014 wage increase in negotiations. Mr. Holbrook did not suggest that the Company was obligated to implement the merit pay increase, indicate that it was a subject that the Union did not wish to bargain about or make a counter-proposal. The Union also did not ask that the Company proceed with the merit increase consistent with its practice for its non-union workforce. The first meeting was then adjourned.

Ground Rules for Bargaining

14. On March 14, 2014, the parties finalized the ground rules. For present purposes, there are 3 relevant provisions:

1. Economic vs. Non-Economic Bargaining. The parties agree to bifurcate negotiations between economic and non-economic terms... Economic issues will not be addressed until the parties have tentatively agreed upon, withdrawn or otherwise concluded negotiations relating to the parties non-economic proposals.

* * *

3. Tentative Agreements. All tentative and other agreements shall be reduced to writing and signed by the Chief Spokesperson (or other authorized representative) of the Parties.

* * *

6. Chief Spokesperson. Each side will designate a Chief Spokesperson to lead the parties' respective negotiating teams. The Chief Spokesperson is responsible for controlling and guiding presentations and discussions to ensure that bargaining is conducted in an orderly and professional fashion. The parties' Chief Spokespersons have the authority to sign Tentative Agreements and bind the Union and the Company to Tentative Agreements reached during negotiations. All tentative agreements are subject to final approval as outlined in section 3 above.

See Memorandum of Understanding #1, Ground Rules for Collective Bargaining (approved by the Union on 3/18/14). Pursuant to the ground rules, the Union designated Joe Carter as its chief spokesperson.

15. Given the discussion about the performance management program and the merit pay increase program and the agreement to bifurcate negotiations, we understood that the Union agreed that wage increases were a mandatory subject of bargaining and would be addressed when the parties turned to economic negotiations.

March 25-26 Bargaining Session

16. The next bargaining session began on March 25, 2014. This session was attended by Joe Carter, Ken Holbrook, Gerry Stallard and Barry Morris for the Union. Over the course of the next two days, Mr. Carter began presenting the Union's first non-economic bargaining proposals, covering five proposals. No "tentative agreements" were made. Discussions were amicable, and both parties presented a conciliatory demeanor.

17. Bargaining resumed on Wednesday, March 26th, and Mr. Carter continued the presentation and discussion of the Union's opening non-economic proposals. The pace accelerated, with Mr. Carter covering 15 Union proposals.

18. During the afternoon session on March 26th, Mr. Holbrook raised the 2014 merit pay increase, characterizing it as an "automatic yearly increase." At this point in time, the merit pay increases had been implemented at the Company's non-union facilities as of February 21, 2014 (retroactive to January 1st); the Anderson plant

employees would have received paychecks in February and March without the increase, providing unequivocal notice that it had not been awarded. We did not agree with Mr. Holbrook that it was an “automatic increase.” LNA has no past practice of across-the-board or automatic wage increases at its non-union facilities. Instead, the range of increases reflects market conditions and management’s assessment of individual performance. For example, in 2012, the range of increases for the Anderson hourly workforce ranged from 0% (non-performing) to 4% (exceptional performance) for an overall average increase of 2.81%. In 2013, the Anderson Plant ranged from 0% to 3.5%, with an average increase of 3.02%.

19. We also explained to Mr. Holbrook that we had already discussed the 2014 merit pay increase at the February 11th bargaining session, signed the ground rules and agreed to defer negotiations about wage increases until after non-economic bargaining. Mr. Holbrook did not disagree with the Company’s position or make any type of counter-proposal. I do not recall the Union raising the merit pay increase again until it filed the ULP charge on September 12, 2014.

20. The parties agreed to schedule their next bargaining session for April 7th. The parties adjourned with the understanding that Mr. Carter would complete the presentation of the Union’s non-economic proposals on April 7th, and that the Company would then make its opening statement and present its non-economic proposals and counter-proposals beginning on May 1, 2014.

April 7 Bargaining Session

21. The parties resumed bargaining on Monday, April 7, 2014. For the Union, Joe Carter, Barry Morris, Gerry Stallard, and Jerry Massey attended. Mr. Carter completed the presentation of the Union’s non-economic package, covering 11 more proposals. In total, the Union presented 31 proposed articles during the three meetings from March 25th through April 7th.

22. The parties also discussed the structure and overall organization of the collective bargaining agreement. The Company provided the Union with a comprehensive table of contents previewing the Company's proposed organization and contents of its proposals. The parties reaffirmed the agreement to meet on May 1st and 2nd for the Company to present its opening non-economic proposals.

May 1-2 Bargaining Sessions

23. When the parties met on May 1st and May 2nd, the Union's chief spokesperson, Joe Carter, was not present. Only Ken Holbrook, Gerry Stallard and Barry Morris attended. No advance notice was given by the Union that the Union's chief spokesperson would be absent.

24. After handing the Company's written proposal to Mr. Holbrook on May 1st, he asked to break for the balance of the day in order to analyze it and prepare questions. No substantive discussions occurred. The parties got back together on Friday morning, May 2nd. During Friday's session, Mr. Holbrook sought clarification on about 11 provisions. Given the scope of the Company's proposal, the Union's questions were limited and superficial. In my view, the Union was treading water because of the absence of Joe Carter. No meaningful negotiations occurred over any of the proposals during these two days, and the Union provided no counter-proposals.

25. When Mr. Holbrook finished asking his handful of questions, the session was adjourned. For all practical purposes, we should have simply mailed the Company's proposal to the Union without meeting. We would have accomplished the same thing and avoided the travel, lodging and other expenses.

26. Given the lack of progress and the view that the Union bargaining team was ill-prepared, asked superficial questions, and lacked the authority to negotiate, we told Mr. Holbrook that we were disappointed that Mr. Carter didn't attend the session. We also asked Mr. Holbrook to notify us, in advance, if Mr. Carter would be absent

from a bargaining session in the future so that we could reschedule it and avoid another unproductive meeting. He did not object to notifying us, and we felt that we had an understanding that the Union would comply with this request.

May 27-28 Bargaining Sessions

27. We met again on May 27th and May 28th in Knoxville. Joe Carter, Jerry Massey, and Barry Morris attended. At this session, tangible bargaining momentum began. The parties began comparing proposals and negotiating differences. After exchanging counter-proposals, making revisions and compromising, the parties reached several tentative agreements. They involved the preamble to the labor contract and clauses regarding union recognition, union stewards, union use of the bulletin boards, union leave, non-discrimination.

28. The parties spent considerable time discussing the Company's proposed no-strike provision and grievance and arbitration procedure. We reached near agreement on the no-strike clause when we conceded to Mr. Carter's request to add a no lock-out provision. We also made material progress on the grievance procedure.

July 7 and 8 Bargaining Session

29. The parties resumed bargaining on July 7th and July 8th. Joe Carter, Ken Holbrook, Gerry Stallard and Barry Morris attended for the Union. During this two-day session, the parties covered a lot of ground and reached several tentative agreements relating to Article 2 (Union Activities), Article 7 (Arbitration), Article 8 (Seniority), Article 10 (Hours of Work, including Sections 10.1, 10.2, 10.3, 10.4, 10.5, 10.6, and 10.7), Article 13 (Leave of Absence), Article 15 (Safety Committee), and Article 19 (Scope of Agreement). These tentative agreements were reached only after exchanging and negotiating counter-proposals and compromising on differences.

30. We also began discussing the Company's proposals on work rules and discipline, with the focus on the concept of "major offenses." Given the progress made

and the additional sessions scheduled for July, I was optimistic that we might be able to turn to economics by early Fall.

July 21-22 Bargaining Session

31. We resumed bargaining on July 21st and July 22nd with Joe Carter, Ken Holbrook, Gerry Stallard and Barry Morris. We presented counter-proposals that compromised the Company's positions on the open sections of Article 1 (Union Recognition), Article 4 (No Strike), Article 5 (Non-Discrimination), Article 19 (Successors & Assigns) and Article 8 (Seniority). We also presented the Union with our proposed job classifications. Progress continued to be made, and we reached a tentative agreement on sections in the proposed Article 10, Hours of Work.

32. The Union's primary focus during these sessions was on the dues check-off clause, an issue repeatedly raised by Mr. Carter. He also emphasized seniority. The seniority discussions focused on the Union's demand that layoffs and bumping be based exclusively on seniority without considering qualifications, skills and abilities. We, in turn, proposed that qualifications be the determinative factor with seniority serving as the tie-breaker.

July 31-August 1 Bargaining Session

33. The parties intended to resume bargaining on July 31st. We had scheduled a two-day session, but Joe Carter no-showed without advance notice of his absence. We viewed his absence without notice as a violation of the understanding reached with the Union on May 2nd. Only Ken Holbrook, Barry Morris and an individual who had never been present at a prior session appeared for the Union.

34. Given our past experience over the last five months, we viewed Mr. Holbrook as a supporting player who lacked independent authority to bargain, make substantive decisions, compromise or approve tentative agreements. He had never been designated as a chief spokesperson, and the Company had not been notified that

he had such authority. In the past, Mr. Holbrook had consistently deferred all decision-making to Joe Carter.

35. In addition, the Union was admittedly unprepared for this bargaining session. When we first gathered on July 31st, Mr. Holbrook announced that he didn't remember the status of negotiations from the end of the last session. He had not brought with him the pending counter-proposals that we had provided to the Union on July 22nd. He had also not prepared any responses or counter-proposals to any of those pending proposals. Mr. Holbrook even stated that he wasn't "sure what those proposals were." He also told the Company's chief spokesperson that he "didn't really know what we were going to do today."

36. To inquire if advance notice was not feasible, we asked Mr. Holbrook when Mr. Carter's scheduling conflict had arisen. We then learned that Mr. Carter had planned to be absent from the July 31st and August 1st bargaining sessions when he agreed to meet on those dates. Given the overall circumstances, the Company proposed that the session be adjourned. Mr. Holbrook consented (and expressed no objection), and the session was adjourned. It was a fruitless but costly exercise. The Company had brought its entire bargaining team to Knoxville for the two day session, and the Union's failure to give notice caused significant expense and inconvenience.

August 28-29 Bargaining Session

37. The parties met again on Thursday, August 28th. From the start, it was apparent that the Union's demeanor and tone had changed. Joe Carter, Gerry Stallard, Ken Holbrook and Barry Morris were present for the Union, but Art Traynor, an in-house UMW attorney, had now joined the Union's bargaining team. It was Mr. Traynor's first appearance at negotiations, and he quickly brought intemperance, rudeness, profanity, personal insults and accusations of bad faith bargaining to the table – behavior not present between the parties in earlier meetings.

38. Mr. Carter opened this session by raising seniority (Union counter #45), and we continued to debate job bidding and the role of seniority and qualifications. Mr. Traynor assumed the leading role in negotiations, usurping Joe Carter's role as chief spokesperson. To meet the Union's concerns to certain proposals, the Company modified its position and proposals on job bidding and on Article 4 (no-strike). We reached a tentative agreement on Article 4, and the Union accepted the Company's revised Article 5, Section 5.1, proposal. Led by Mr. Traynor, the discussion then centered primarily on the arbitration of statutory discrimination claims.

39. The Union also raised Article 10, Hours of Work, and after reaching tentative agreements on the open non-economic sections, the Union demanded to negotiate a paid lunch break for all employees. We viewed this demand as an economic proposal and in conflict with the ground rules. But given the Union's insistence, we conceded and offered to provide an unpaid lunch break for the 8 hour shift employees and a paid lunch break for all others (10/12 hour shift), a proposal that the Union rejected.

40. The parties also revisited the 90-day probationary period proposal and the use of temporary employees. In response to the concerns raised by the Union, the Company modified its proposal to use temporary employees only if they did not impair or displace the bargaining unit, deprive bargaining unit employees of work and no employees were on layoff. Although meeting the Union's objections, Mr. Traynor conditioned signing off on the tentative agreement on the Company agreeing to restrict on its management rights proposal, a position we viewed as regressive. After the Union rejected another compromise offered by Company, the parties broke for the day.

41. The meeting of August 28th was unlike any other that the parties had held up to that point. The demeanor of Mr. Traynor was angry, aggressive, accusatory and confrontational. It was the parties' first bargaining session that was tense and hostile.

42. The parties met the following morning, August 29th, and the atmosphere set by the Union the previous day remained. The parties turned first to seniority, and we discussed a provision that probationary employees would not accrue seniority during their probationary period. A lengthy debate ensued over the probationary employee proposal, the Union's inflexible position, and Mr. Traynor conditioning the signing of the tentative agreement on temporary employees to a concession on subcontracting. Mr. Traynor was visibly angry, confrontational and mumbling profanities. We then took a mid-morning break.

43. During the recess, we met with Mr. Carter and again expressed our disappointment that he failed to attend the last bargaining session without notice. We stressed that it was incumbent on the Union to notify us in advance if he would be absent. He offered no explanation for why the Company was not notified but did state, for the first time, that Mr. Holbrook had authority to negotiate in his absence. Mr. Traynor then announced that the Union was filing unfair labor practice charges against the Company, and the parties agreed to adjourn the meeting. The Company solicited future meeting dates, but none were provided. And the Union's flurry of ULP charges followed.

44. At not point during the August 28th and 29th bargaining sessions (or anytime thereafter) did the Union ask if the Company was going to hold the family outing. I suspect the decision not to make inquiry was deliberate since the Union intended to file a ULP over it and would avoid confirmation of the outing before falsely claiming it had been cancelled.

The Annual Family Outing

45. On September 12, 2014, the Union filed 3 ULP charges.¹ The first claimed that the Company told employees that it would decertify the union, make only one

¹ The second, Charge 10-CA-136615, alleged that the Company wrongfully withheld the January 2014 merit wage increase, cancelled the annual family outing and changed employees work schedule. This ULP Charge was

“take it or leave it” offer and that bargaining was futile and would last 2-3 years “because the union is holding it up.” *See* Original Charge.

46. In the second ULP charge, the Union alleged that the Company made a unilateral change by “not holding its family outing.” As part of this allegation, the second charge alleged that the Company had “attribut[ed] the reason for its cancellation to the employees exercise of protected rights.” *See* Charge 10-CA-136615.

47. The allegation that the Company cancelled the family outing was untrue, and it was known to be false at the time the Union filed the charge on September 12, 2014. Before the August bargaining session, I spoke with Paul Guess, a bargaining unit employee, on August 14, 2014 and told him that the family outing would be held, and that the plans would be announced shortly. In addition, I also understand that another hourly employee, Wendy Hannah, advised Paul Guess in this same time frame that the employee outing would be held.

48. In addition, on August 17, 2014, Wendy Hannah, an hourly employee, had visited Pin Strikes, an entertainment center in Chattanooga, to examine the facility as a possible location to host the family outing. Pin Strikes has bowling lanes, a laser tag facility, video arcade, bumper cars, a balladium, billiards and a restaurant on site. Ms. Hannah spoke with the manager and obtained pricing for the event, including for employee gift cards and food.

49. In or about the first week of September, Mr. Gonzalez, the Anderson Plant Manager, scheduled the family outing for October 4, 2014 at Pin Strikes. Mr. Gonzalez negotiated a package to permit employees to enjoy bowling and games on October 4th

dismissed by Region 10 (excepting only that portion that attributes fault to the union). The third, 10-CA-136617, complained that the Company improperly cancelled the July 31st session and had bargained in bad faith. This ULP Charge was also dismissed by Region 10.

and receive a \$125.00 gift card. Based on 54 employees, the facility, gaming and food cost for the outing was projected to be \$8,250.00.²

50. On September 9, 2014, three days before the Union filed the second charge, the Company notified all Anderson employees (including Barry Morris) that the family outing would be held at Pin Strikes on Saturday, October 4th. In addition, flyers were posted on bulletin boards, in the break room, at time clocks and distributed to the production and mining employees. And the family outing was held on October 4th at Pin Strikes. Thus, the Union's allegation that the Company "cancelled" the family outing was indisputably false (and known to be false when filed), and this portion of the charge has been dismissed.

51. What remains of this ULP charge is the false allegation that I "attribut[ed] the reason for its cancellation to the employees exercise of protected rights." See 10-CA-136615, ¶ 2 (second bullet). In the Amended Charge, it falsely claims that I told employees that the Company was not going to have a family outing "because of the union." See Amended Charge 10-CA-136608, ¶ 2 (third bullet). And in the Complaint, it has now been falsely elevated to a threat, alleging that I "threatened" employees that the Company would not hold a family picnic because the employees are represented by the Union and informed them that the employees at Crab Orchard would have a picnic because they are not represented by a union. See Complaint, ¶ 7(i) and (ii). The event was not cancelled, and I never told anyone that it had been cancelled or blamed the Union for its alleged cancellation.

52. Based on the Field Examiner's October 3rd letter and the Complaint, the Union apparently claims that in or around July or August 2014, I spoke, by telephone, with an unidentified employee, and told the employee that the family outing would not

² In contrast, the 2012 and 2013 family outings were held at Lake Winnepesaukah, a small amusement park near Chattanooga. In 2012, the meal tickets and rides were budgeted at \$4,944.00 and in 2013, at \$8,387.00 at Lake Winnepesaukah. In 2010 and 2011, the employee outing was held as a cookout in a pumpkin patch next to the Anderson Plant with horseshoes and bingo as entertainment.

occur “because of the expense of union negotiations.” The Union also claims that I said that Crab Orchard employees were having a family outing “because they are non-union

53. Those allegations are untrue. On or about August 14, 2014, I did have a phone conversation with Paul Guess about the family outing. I did not tell him that the outing would not occur or was cancelled. I explained to Mr. Guess that the Company would still hold the outing and advised him that the Plant Manager, Joe Gonzales, would be informing the workforce - once the final plans had been made - as to where and when the family outing would occur. At that time, neither the location nor date had been determined.

54. There was no fixed location or set date in late summer or early fall for holding the employee outing. In 2012 and 2013, the family outings were held at Lake Winnepesaukah, a small amusement park near Chattanooga. In 2010 and 2011, the family outing was held as a cookout in a pumpkin patch next to the Anderson Plant with horseshoes and bingo as entertainment. Rather than being cancelled, the 2014 outing was an upgrade, with budgeted costs expected to exceed \$8,000.00.

55. My conversation with Mr. Guess ended with him telling me that he “understood and would wait to hear” from Mr. Gonzales. During the course of this conversation, there was no discussion about Crab Orchard’s non-union status, a wage increase or any suggestion that the Union was to blame for cancelling an outing (that was, in fact, still in the planning stage).

2014 Merit Pay Increase

56. In Charge 10-CA-136615 filed on September 12th, the Union alleged that the Company wrongfully withheld the 2014 merit wage increase, and that I “attribut[ed] the reason for its withholding to the employees exercise of protected rights.” The Board dismissed that portion that claimed the wage increase was

improperly withheld. The derivative “attribution allegation” was inserted into the First Amended Charge, and it underlies the present Complaint.

57. I did not attribute the failure to implement the 2014 merit pay increase to the Union. We have been up-front with both the Union and the employees about our views on unilateral changes while the parties are in the middle of negotiating a first labor contract. Shortly after the election in 2013 and on or about November 11, 2013, the Company held meetings with the Anderson Plant employees to alleviate any concerns that they may have about the election outcome. During those meetings, the Company explained to the employees that we intended to address the 2014 merit increase in negotiations with the Union and not unilaterally implement it.

58. We have been careful to explain that the purpose of the Company’s decision was to comply with the Company’s legal obligation to bargain in good faith, to deal with the employees’ certified bargaining representative and to avoid interference with the employees’ Section 7 rights. The Company’s decision was made in a good faith effort to comply with Board law regarding discretionary merit pay increases that occur in the course of bargaining for a first labor contract.

59. At the first bargaining session on February 11, 2014, we gave the Union unequivocal notice that we viewed wages as a mandatory bargaining subject, that we intended to bargain over the 2014 wage increase and would not unilaterally implement a merit wage increase. Since we conveyed that position, the Union never declined to negotiate over the 2014 increase, never suggested that the merit increase was not subject to the duty to bargain and made no counterproposals for an increase. Instead, after the Company notified the Union that it considered wage increases to be a mandatory subject of bargaining and that LNA intended to negotiate with the Union over the wage

increase, the Union negotiated ground rules and agreed to address the economic issues, including the 2014 wage increase, after the parties resolved non-economic issues.³

60. I have discussed wage increases with only two employees, both outspoken union supporters, since we started contract negotiations in February 2014. These discussions occurred on April 6, 2014, the day before our April 7th bargaining session. While at the Anderson Plant, I was approached by Mr. Guess and Ransom Green. Mr. Guess asked about the status of the 2014 pay increases. Mr. Green asked if certain maintenance employees could be upgraded in pay. These conversations occurred after the Union and the Company had bargained on February 11th and March 25th-26th and after the parties had signed the ground rules on March 14, 2014.

61. At that point in time, the Company's position on the merit increase had been communicated to the Union almost two months earlier (and originally to the employees in November of 2013). The merit increase had also not been implemented in Anderson on February 21, 2014. Both employees had unequivocal notice of the Company's position on the merit increase, the March 14th agreement deferring negotiations on wages (including any merit increase), and the fact that it had not been implemented on February 21st. By April 6, they had received at least 3-4 paychecks, and knew that their 2013 wage rates remained steady.

62. I carefully explained to both of them that wages and benefits are subject to the bargaining process, and that management cannot promise or discuss wages and benefits directly with employees because the Union is their bargaining representative. I also told them that we must follow the law and respect the bargaining process. I was supporting, not interfering with, their Section 7 rights. I never told Mr. Guess or Mr.

³ In recent years, including 2012 and 2013, merit wage increases were announced in the third week of February with their effect retroactive to January 1. In 2014, merit wage increases were announced and implemented on February 21, 2014 for non-unit employees retroactive to January 1, 2014.

Green – or any other hourly employee - that merit increases were being withheld “because of the Union” or anything to that effect. I have never denigrated the Union to any bargaining unit employee at Anderson. My intent was simply to explain to the employees my understanding of the law, i.e. that the Company cannot make unilateral changes to wages without first discussing it with the Union.

63. During my conversations with Mr. Guess and Mr. Green, I never blamed the Union for the status of the merit pay increases and made no promise(s), express or implied, directly or indirectly, to improve one or more working conditions.

Decertification and Implied Promises

64. I have had one conversation with one employee at the Anderson Plant regarding decertification. In June 2014, I was approached by Travis Holt, an hourly employee, and asked how employees “could get rid of the Union.” I did not initiate this conversation with Mr. Holt or raise the topic of decertification. In response to his direct question, I told Mr. Holt that employees would have to follow NLRB election procedures and that the Company could have no involvement with it. I explained that the Board imposed certain time limitations and suggested that Mr. Holt should consult the NLRB website or contact the NLRB via phone to get additional information if that is what he wished to do. I offered him no assistance or encouragement whatsoever. Other than this single, brief conversation, I have never spoken to another employee about decertification.

65. I never made any promises, express or implied, directly or indirectly, to improve one or more working conditions if employees filed a decertification petition.

**Kenneth Summers and
The “One Take It or Leave It Contract Proposal” Allegation**

66. The Complaint alleges that in August 2014, Kenny Summers, while in the mine, told employees that the Company “will only make one contract offer to the Union and no more, and that employees would not like the offer, [and] informed its employees that it would be futile for them to support the Union as their bargaining representative.” See Complaint, ¶ 8. I do note that this allegation is different than the statement alleged in the Original Charge (10-CA-136608) that the Company “would only make “one take it or leave it” contract proposal.

67. Kenny Summers is the mine foreman, and while I believe he meets the statutory definition of a “supervisor” under section 2(11) of the Act, he did not have the authority to address matters related to collective bargaining with employees. He has no authority to act as a Company spokesman on collective bargaining with the Union.

68. Mr. Summers is a working foreman who coordinates mining activities. It is his responsibility to examine and inspect mine headings, and using his professional judgment and experience, to choreograph, assign and direct the drilling, blasting and scaling work that occurs in the mine. His other key primary responsibilities include maintaining a safe working environment and trouble-shooting any problems that might occur.

69. However, while Mr. Summers may qualify as a supervisor under the Act, he was not acting as an agent of the Company for purposes of collective bargaining or communicating with employees about collective bargaining. I understand that Mr. Summers denies making the statement attributed to him. But assuming it to be true for purposes of this motion, it is undisputed that Mr. Summers is not a member of the Company’s bargaining team or committee, has never attended a bargaining session, is not consulted about the Company’s bargaining proposals or strategy, is not provided copies of either the Company’s or the Union’s proposals and has never been briefed by

any member of Company management regarding any of the Union's or the Company's proposals or the parties' negotiations. He has never been asked to speak with employees about the collective bargaining process, the Company's negotiating position or any Company proposal. He has absolutely no role in, or responsibility for, any aspect of the collective bargaining process between the Company and the Union.

70. In addition, Mr. Summers was specifically instructed on or about May 2, 2014 not to discuss collective bargaining issues with the bargaining unit employees. I prepared a memo that was distributed to all supervisors at the Anderson Plant, including Kenny Summers, on May 2, 2014. It directed the following:

If you are personally approached and/or asked questions at work and/or in the community regarding the bargaining process concerning the Anderson location, please do the following:

Please do not discuss and/or share your personal opinion with anyone about the Company's bargaining position or proposals. The Company's bargaining position should only be communicated at the bargaining table by members of the Company's official bargaining committee.

If you witness a group at the plant having a discussion regarding the bargaining process, please direct the individual(s) to go back to work immediately. Everyone should be focused on working safely and performing a full day's work. You should report the content of such conversations to me.

If an hourly employee(s) shows and/or shares a copy of the any of the Company's proposal(s), please immediately direct the individual(s) to go back to work. Again, do not comment and/or share your personal opinion regarding any matters concerning the bargaining processes between the parties. Please properly document incident by note the individual(s) name, date, time, brief summary of the discussion, and where they attempted to show and/or share this information with you.

71. In addition, shortly after this memorandum was distributed, I traveled to the Anderson Plant and met with the supervisors, including Mr. Summers, and instructed them not to discuss collective bargaining issues with the hourly employees. I specifically instructed them, including Mr. Summers, not to discuss or express opinions

about the bargaining process or any Company proposals. I also directed them that the Company's bargaining positions and proposals would only be communicated to the Union by members of the Company's official bargaining committee.

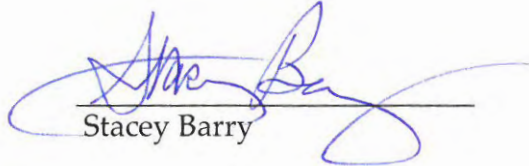
72. Mr. Summers did not have the actual or apparent authority to speak on the Company's behalf about the collective bargaining process with the Union or the bargaining unit employees. The Company did nothing to create any belief that it had authorized Mr. Summers to speak to the employees about the Company's bargaining strategy or proposals or to act or speak for the Company on the topic of collective bargaining. The Company has never held out Mr. Summers as being privy to management decisions, strategies or proposals regarding collective bargaining, the status of negotiations or as speaking on its behalf. Given his role, position and duties and his exclusion from the bargaining committee and the absence of any briefings regarding the content of any Company proposals, there is no basis for any employee to reasonably believe that Mr. Summers was reflecting Company policy and speaking and acting for management.

73. The comments attributed to him are also entirely unrelated to his duties. Mr. Summers is a mine foreman who does not regularly communicate management's bargaining priorities or positions to employees, but he has been expressly prohibited from engaging in such discussions on any occasion. Had he made these comments, he would have been acting outside the scope of his duties and contrary to an express restriction on his authority. In addition, the statements attributed to Mr. Summers are untrue and inconsistent with the statements and actions of the Company.⁴ Accordingly,

⁴ The allegation in the Complaint claims that the statements were made in August of 2014. At this point in time, the parties had been negotiating for six months. And given the extent of the parties' negotiations, proposals, counter-proposals and tentative agreements that had been achieved by August 2014, the comments are nonsensical and disconnected from the bargaining reality. Assuming the Union briefs the bargaining unit on the negotiations, the obvious falsity of the statements allegedly made by Mr. Summers would have made him appear utterly ignorant of the status of the parties' negotiations.

Mr. Summers was not acting as an agent of the Company when he allegedly expressed his opinions about collective bargaining to employees.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on February 23, 2015.


Stacey Barry